SUPREME COURT OF THE UNITED STATES.

No. 303.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE VEAZIE BANK, PLAINTIFFS,

vs.

JEREMIAH FENNO, COLLECTOR OF INTERNAL REVENUE.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

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1 UNITED STATES OF AMERICA,
District of Maine, ss:

At a term of the Circuit Court of the United States for the first circuit, begun and holden at Portland, within and for the said district of Maine, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-seven. Present: The Honorable Nathan Clifford, Associate Justice of the Supreme Court, and the Honorable Edward Fox, District Judge.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Veazie Bank
vs.
JEREMIAH FENNO.

This was an action of assumpsit, whereby the plaintiff, "an incorporated institution, established by the statutes and laws of Maine," sought to recover a certain sum, with a penalty attached, and costs of collection, alleged to have been paid by the plaintiff, under protest, to the defendant in his capacity of collector of internal revenue for the fourth district of the State of Maine, in virtue of a tax assessed against said institution by the assessor of internal revenue of said district.

The defendant pleaded the general issue of non assumpsit.

The cause was opened to the jury by the plaintiff, by reading the following agreed statement of facts, to wit:

2 U. S. C. C., Sep. 3, 1867.

PREST., DIRECTORS, & COMPANY OF VEAZIE Bank
vs.
JEREMIAH FENNO.

I. The Veazie Bank of Maine is a State bank, incorporated by the legislature of the State of Maine, under the corporate name of the President, Directors, and Company of the Veazie Bank, now doing business under its charter in the city of Bangor, with the power to issue bank bills. (See charter, 1848.)

II. That on the 17th day of April, A. D. 1867, a tax of ten per cent. was assessed upon said bank, upon State bank bills issued for circulation, and paid out since August 1st, 1866, ($1,485,) amounting to one hundred and forty-eight dollars and fifty cents, which, together with five per cent. penalty added by the collector, amounting to seven dollars and forty-three cents; and warrant and service, one dollar and fifty-six cents; in all, one hundred and fifty seven dollars and forty-nine cents, was paid by said bank, on the seventeenth day of May, A. D. 1867, under protest, and to prevent a distraint, which said defendant was then proceeding to make to collect said tax and costs.

III. That claim was duly made to the Commissioner of Internal Revenue for the refunding the said tax, on the ground that
3 the law authorizing the tax is unconstitutional; and on the fifteenth day of July, A. D. 1867, was rejected.

IV. The defendant was a collector of the internal revenue of the United States, as set forth in the writ.

V. It is agreed that the plaintiffs were regularly assessed in said sum of $148 50 for the amount of its own bank bills, paid out by said bank, from and after the first day of August, 1866, being ten per centum of said amount, under the provisions of the act of Congress of July 13, 1866, and that such tax was duly and regularly committed to the defendant, as collector of the internal revenue of the United States for the fourth Maine district, and that all the proceedings preliminary to and accompanying said district, were regular and in due form.

The charter of said bank referred to, is made a part of this case, and also the writ and pleadings.

BRADBURY & BRADBURY,
Att'ys for Pl'ff.

G. F. TALBOT,
Att'y for D'ft.

George F. Talbot, esquire, district attorney and of counsel for the defendant, thereupon requested the court to instruct the jury, "that upon the facts, as stated in the agreed statement, the plaintiffs cannot recover in said action, and that the verdict of the jury ought to
4 be for said defendant."

Bion Bradbury, esquire, of counsel for the plaintiff, requested the court to instruct the jury, "that the 2d clause, ninth section of the act of Congress, approved July 13, 1866, 'entitled, An act to reduce internal taxation, and to amend an act entitled an act to provide internal revenue to support the government, to pay the interest on the public debt, and for other purposes, approved June 30th, 1864, and acts amendatory thereof,' under which the tax claimed to be recovered back in this action was assessed and collected, is unconstitutional and void, and that, therefore, the verdict of the jury should be for the plaintiff."

Whereupon, and inasmuch as the agreed statement of facts contained the whole evidence in the case, it became necessary for the court in the usual practice of the court to determine whether the instruction prayed by the defendant should be given to the jury as requested, and also to determine whether the instructions prayed by the plaintiff should, or should not be given to the jury, and in considering the respective prayers for instructions, and the aforesaid requests of the respective parties, the following questions occurred, in respect to which the judges of the Circuit Court aforesaid were opposed in opinion, to wit:

First. Whether the second clause of the ninth section of the act of Congress of the thirteenth of July, 1866, under which the tax in this case was assessed and collected, is a valid and constitutional law.

Second. Whether the clause aforesaid, of the act of Congress aforesaid, conferred the legal and constitutional power upon the defendant, under his warrant from the assessor, to collect the tax in this case of the plaintiffs.

Third. Whether Congress possessed the power, under the Constitution, to enact the second clause of the ninth section of that act, and to authorize the assessment and collection of the tax in this case.

Upon which questions the judges of the said Circuit Court were opposed in opinion as aforesaid, and thereupon, upon the motion of the counsel for the plaintiff, it was ordered by the court, that the said questions upon which the said judges were so opposed, should be certified, under the seal of the court, to the Supreme Court of the United States, at their next session, for a final decision.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.
EDWARD FOX,
District Judge of Maine.

UNITED STATES OF AMERICA,
District of Maine, ss :

OFFICE OF THE CLERK OF THE CIRCUIT COURT, U. S.

I, Geo. F. Emory, clerk of the Circuit Court of the United States, for the district of Maine, do hereby certify that the foregoing contains the proceedings of said court in the case therein mentioned.

In testimony whereof, I have set my hand and affixed the seal of said court, this fifteenth day of November in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] GEO. F. EMORY, *Clerk.*

6 STATE OF MAINE :

In the year of our Lord one thousand eight hundred and forty-eight.

An act to incorporate the President, Directors, and Company of the Veazie Bank of Bangor.

Be it enacted by the senate and house of representatives in legislature assembled, as follows—

Section 1. Samuel Veazie, John Fiske, James Crosby, John McDonald, Jabez True, Nathaniel Lord, and Jones P. Veazie, their associates, successors and assigns, are hereby incorporated into a company, by the name of the President, Directors and Company of the Veazie Bank of Bangor.

Section 2. The capital stock of said Bank shall be two hundred thousand dollars, divided into shares of one hundred dollars each; and said bank shall be located and established in the city of Bangor, in the county of Penobscot. One half of said capital stock to be paid in, and said bank put in operation by the first day of October, eighteen hundred and forty-eight, and the other half of said capital stock to be paid in on or before the first day of October, eighteen hundred and forty-nine.

Section 3. Said corporators are hereby authorized and empowered to exercise all the rights and privileges conferred upon such corporations by the laws of this State, and shall be subject to all the liabilities and restrictions thereof.

IN THE HOUSE OF REPRESENTATIVES,
July 7, 1848.

7 This bill having had three several readings, passed to be enacted.

DAVID DUNN,
Speaker, pro tem.

IN SENATE, *July* 7, 1848.

This bill having had two several readings, passed to be enacted.
July 14, 1848.

CALEB R. AYER, *President.*

Approved:

JOHN W. DANA.

I hereby certify that the foregoing is a true copy of the original deposited in this office.

JOHN G. SAWYER,
Dep'y Sec'y of State.

UNITED STATES OF AMERICA,
Maine District, ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT, U. S.

In testimony that the above is a true copy of the charter of the President, Directors and Company of the Veazie Bank, filed and as of record, in a cause pending in the Circuit Court of the United States for Maine District, wherein said [said] President, Directors and Company are plaintiffs, and Jeremiah Fenno is defendant,

I have hereunto set my hand and affixed the seal of said Court, this fifteenth day of November, in the year of Lord one thousand eight hundred and sixty seven.

[SEAL.]

GEO. F. EMORY,
Clerk of the Circuit Court U. S. for Maine District.

8 MAINE DISTRICT, *ss:*

[L. S.] The President of the United States of America, to the marshal of our district of Maine, or his deputy, greeting:

We command you to attach the goods or estate of Jeremiah Fenno, of Bangor, in Penobscot County, in our district of Maine, gentleman, and collector of internal revenue for the fourth district of the State of Maine, to the value of five hundred dollars, and summon said Fenno (if he may be found in your district) to appear before our judges of our Circuit Court of said United States for the first circuit, next to be holden at Portland, within and for our said district of Maine, on

the twenty-third day of September instant, then and there in our said court to answer unto the President, Directors and Company of the Veazie Bank of said Bangor, an incorporated institution established by the statutes and laws of Maine, and doing business at said Bangor, in a plea of the case, for that said defendant, at said Portland, on the day of the purchase of this writ being indebted to said plaintiffs in the sum of five hundred dollars for so much money by said Fenno, before that time had and received to the use of said plaintiffs, then and there, in consideration thereof, promised to pay said plaintiff said sum on demand.

Also, for that said pl'ffs at said Bangor, during the month of March last, paid out from said bank for the purpose of circulation, of their own issue, State bank bills of the amount of fourteen hundred
9 and eighty-five dollars, for which said bank, against their consent, by the assessor of internal revenue of the United States, for said fourth district, were assessed a tax of ten per cent. upon the dollar, amounting to the sum of one hundred and forty-eight and fifty cents, which said sum, said plaintiffs refused to pay, but by force of said Fenno, as collector as aforesaid, and against their protest, were compelled on the seventeenth day of May last so to do, together with a penalty of seven dollars and forty-three cents, and costs of collection, at one dollar and fifty-six cents, which said assessment and collection were illegal and erroneous; whereby, upon the day of the purchase of this writ at said Portland, said Fenno was indebted to said plaintiffs in one other sum of one hundred and fifty-seven dollars and forty-nine cents, for so much money had and received by said Fenno, before that time to the use of said plaintiffs; and then and there, in consideration thereof, promised said plaintiff to pay said plaintiff said sum on demand. And said plaintiffs thereupon appealed for redress to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury of the United States, established in pursuance thereof, and a decision of said commissioner has heretofore been had thereon, against said claim sued for in this writ, to the damage of the said pl'ffs, as they say, the sum of five hundred dollars, which shall then and there be made to appear, with other due damages, and have you there this writ with your doings therein.

10 Witness, the Honorable Salmon P. Chase, at Portland, this ninth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

GEO. F. EMORY, *Clerk.*

SEPT. 9TH, 1867.

DISTRICT OF MAINE, *ss:*

By virtue of this writ, I have this day attached a ship as the property of the within-named defendant, and also gave him a summons in hand for his appearance to court.

H. A. HEAD,
U. S. Dep. Marshal.

Fees:

Service	2 00
Travel, 140 m's	8 40
	$10 40

Endorsed: (Filing.) Writ. Pres., Directors, and Company of Veazie Bank *vs.* Jeremiah Fenno. U. S. C. Court, Portland, Sept., 1867. No. 185. Peters & Wilson for pl'ffs.

11 Circuit Court of the United States.

THE PRESIDENT, DIRECTORS AND COMPANY of the Veazie Bank,
vs.
JEREMIAH FENNO.

SEPTEMBER, 1867.

MAINE DISTRICT, *ss:*

And now, the said Fenno comes and defends, when, where, &c., and for the plea says, that he never promised the plaintiffs in manner and form as they have in their writ and declaration alleged against him, and of this he puts himself upon the country.

By his attorney, GEO. F. TALBOT.

And the pl'ff doth the like.

By BRADBURY & BRADBURY, *his Att'y.*

UNITED STATES OF AMERICA,
District of Maine, ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT U. S.

In testimony that the above contains true and perfect copies of the writ and pleadings in a cause pending in the Circuit Court of the United States for Maine district, wherein the President, Directors and Company of the Veazie Bank are plaintiffs, and Jeremiah Fenno is defendant,

I have hereunto set my hand and affixed the seal of said court this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.]

GEO. F. EMORY,
Clerk of the Circuit Court U. S. for Maine District.

Supreme Court of the United States.

DECEMBER TERM, 1868.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE VEAZIE BANK, *Plaintiffs*,

vs.

JEREMIAH FENNO, *Collector of Internal Revenue.*

No. 153.

Brief for Plaintiff in Error.

I.—Introductory.

This case comes up from the circuit court of the United States for the district of Maine, on a certificate of division of opinion.

The question certified is that of the constitutionality of the 2d clause of the 9th section of the act of Congress, approved July 13, 1866, which is in the words following, to wit: "That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

Laws of the United States, vol. xiv, p. 146.

By the acts of February 25, 1863, (12 Stat. at Large, p. 668,) and the act of June 3, 1864, (13 Stat. at Large, p. 99,) Con-

gress provided for the organization of national banking associations.

The 41st section of the said act of 1864 taxes the national banks as follows:

It imposes a tax of one per cent. annually on circulation, one-half of one per cent. on deposits, and one-half of one per cent. on the capital beyond the amount invested in United States bonds.

It further provides, that the rate of State taxation authorized shall not exceed the rate imposed upon the shares in banks organized under authority of the State where national bank is located. *Ibid.*

The Constitution provides that—

"Direct taxes shall be apportioned among the several States * * according to their respective numbers." (Art. 1, sec. 2.)

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be made." (Art. 1, sec. 9.)

"All duties, imposts, and excises shall be uniform throughout the United States."

A distinction is taken in the Constitution between "taxes" so termed, and "duties, imposts, and excises."

2 Story's Comm., sec. 946.

Two rules are prescribed: 1st, the rule of apportionment for "direct taxes;" and, 2d, the rule of uniformity for "duties, imposts, and excises." If there are any other kinds of taxes not embraced in one or the other of these two classes, (and it is certainly difficult to give full effect to the words of the Constitution without supposing them to exist,) it would seem that Congress is left at full liberty to levy the same by either rule, or by a mixture of both rules, or perhaps by any other rule not inconsistent with the general purposes of the Constitution. It is evident that "duties, imposts, and excises" are indirect taxes in the sense of the Constitution. But the difficulty still remains to ascertain what taxes are

comprehended under this description, and what under the description of direct taxes.

2 Story's Comm., sec. 948.

The District of Columbia and the territories of the United States are subject to direct taxation, if Congress think proper to extend the direct tax to them.

Loughborough *vs.* Blake, 5 Wheat., 517.

A tax on carriages is not a direct tax, and may be laid uniformly. Whether such a tax falls within the words "impost, duty, or excise," which Constitution requires to be uniform, seems doubtful; but it is clearly a tax which Congress has power to levy, and it may decide the mode of levying it, whether uniformly or by apportionment.

Hylton *vs.* United States, 3 Dall., 171.

Tax by a State on importer of foreign goods is unconstitutional.

Brown *vs.* State of Maryland, 12 Wheat., 419.

A tax under State authority on United States stock is unconstitutional.

Weston *vs.* City Council of Charleston, 2 Peters, 449.

The power of Congress in laying taxes is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property without interfering with the action of the other; for taxation is but taking small portions from the mass of property, which is susceptible of almost infinite division.

2 Story's Comm., sec. 1064.

The manner of applying a power may be an abuse of it; but this does not prove that it is unconstitutional.

2 Story, sec. 1086.

II.—The present tax is unconstitutional, because a direct tax without State apportionment.

We object that the tax in this case is a direct tax, and, not being laid according to the rule of apportionment, is unconstitutional.

What are direct taxes?

1. We remark, that the provision of the Constitution on the subject of direct taxes was deemed of paramount importance at the time of the adoption of the Constitution.

See the debates of Federal convention, State conventions, the articles in Federalist, and the contemporaneous history of the times.

The corollary from this is, that the Constitution should be so construed as not to fritter away this provision, but to maintain it as an important principle of the Constitution.

2. The only case ever before the Supreme Court, involving this question, is Hilton *vs.* United States, (3 Dall. R., 171.) The only point really adjudicated by the court in that case was, that a tax on carriages was not a direct tax.

The grounds of this decision, as stated in the several opinions of the judges, were:

(*a.*) The doubt whether any taxes were direct, in the sense of the Constitution, but capitation and land taxes.

(*b.*) That in case of doubt, the rule of apportionment ought not to be favored, because it was matter of compromise, and itself radically indefensible and wrong.

(*c.*) The monstrous inequality and injustice of the carriage tax if laid by the rule of apportionment, which would show that no tax of this sort could have been contemplated by the convention as within the rule of apportionment.

(*d.*) That the terms of the Constitution were satisfied by confining the clause respecting direct taxes to capitation and direct taxes.

(*e.*) That, accurately speaking, all taxes on expenses or consumption are indirect taxes, and a tax on carriages is of this kind.

(*f.*) And (according to Justice Story, what is probably of most cogency and force, and of itself decisive) that no tax could be a direct one, in the sense of the Constitution, which was not capable of apportionment according to the rule laid down in the Constitution.

3. In reply to these points, thus raised by the judges in Hilton *vs.* United States, we remark:

(*a.*) The Constitution says "direct taxes shall be apportioned," &c.

This evidently contemplates direct taxes in the plural, and means that there are more kinds of direct tax than one.

In pursuance of this idea, the Constitution further provides, "No capitation or other direct tax shall be laid," &c. This necessarily means that there might be more than one direct tax.

It may be assumed as a fact, beyond all dispute, that the Constitution intended that there should be more direct taxes than one—the one expressly mentioned by it, the "capitation" tax.

Under the pressure of this inexorable necessity, the court concedes that there may be one other direct tax in addition to the capitation tax, viz, the land tax.

It is difficult to see how a tax upon land can be considered as of a different character from a similar tax upon personal property. Suppose that, under the same act an equal tax in amount is levied on the furniture in the house as on the house itself, what difference in principle is there between the two taxes. By what process of reasoning can the tax on the house be held to be a direct tax, and the tax on the furniture not a direct tax?

By the act of January 9, 1815, (3 Statutes at Large, p. 164,) a direct tax is laid on land and slaves. This tax on slaves is laid not as a capitation tax, but as a tax on personal estate. If it had been laid as a capitation tax, it would have been laid on all persons in the United States, but it was laid only on property. Now, if a direct tax was laid on that kind of per-

sonal property denominated slaves, why can it not be laid on other kinds of personal property?

It is to be noted that art. 1, sec. 9, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," adds nothing to the rule of taxation as contained in art. 1, sec. 2, that "representatives and direct taxes shall be apportioned * * according" to "numbers," but only regulates the manner of executing that rule, by requiring that it shall be executed agreeably to the "census or enumeration" directed to be taken. That is to say, art. 1, sec. 2, prescribes the rule as to the collection of direct taxes, and art. 1, sec. 9, provides that this rule shall be executed only under the census directed in the Constitution to be taken. Direct taxes are to be laid according to numbers, and those numbers are only to be ascertained in one way, by the census.

To resume, we are at a loss to see why a tax on the furniture in a house is not a direct tax equally as a tax upon the house in which the furniture is.

We cannot see the force of the dictum of the court.

(*b.*) "That the rule of apportionment ought not to be favored, because it was matter of compromise, and in itself radically indefensible and wrong."

That "the rule of apportionment ought not to be favored, because it was matter of compromise," strikes us a startling proposition. According to this principle, the mode of electing the President, the constitution of the Senate, the power of Congress over commerce, ought not to be favored, because they were matters of compromise. Indeed, General Washington informs us that the Constitution itself was the result of a spirit of compromise, and therefore, according to the dicta of the judges in the case of Hylton, the Constitution itself is not to be favored.

In opposition to this proposed principle of construction, it might be contended that those provisions of the Constitution, which were the result of compromise, were peculiarly to be favored, because they were the *lites motæ* of the sovereign

contracting parties, and peculiar scrutiny and attention were called to them, and their violation or evasion involves not mere usurpation of power, but, in a certain sense, political treachery.

As to the suggestion by the court that the rule of apportionment was in itself "radically indefensible and wrong," we submit that this was a view of the case outside of the mission of the court. If the Constitution is to be construed favorably or unfavorably, according to the views of expediency of the judges, then we are embarked on a boundless sea, without any sure guide.

We insist that this clause of the Constitution is to be interpreted like any other clause, fairly and truthfully, without prejudice, or the bias of supposed expediency.

(*c.*) The inequality and injustice of the carriage act, if laid by the rule of apportionment.

This, we submit, has nothing to do with the law of the case. The only question is, whether this is a direct tax. If it is, the Constitution provides for it. The inconvenient consequences are not responsibilities resting with the judges. Their mission is to announce the law, not to enact it on the ground of expediency. The monstrous inequality which the court sees in the consequences resulting from considering the carriage tax as a direct tax may well be questioned.

But it is unnecessary to say anything more on this point. The Constitution considers population so far as direct taxes are concerned as a proper standard of the wealth of a State and its tax-paying power. And this principle can be made to apply as well to carriages as other kinds of property.

(*d.*) "The terms of the Constitution were satisfied by confining the clause respecting direct taxes to capitation and land taxes."

To assert that the terms of the Constitution are satisfied by confining the clause respecting direct taxes to capitation and land taxes, is to assume the whole question in controversy. It is much more true to say that the Constitution obliges the

court to hold that there is some other direct tax than the one named in the Constitution—the capitation tax. The court, under this necessity, concedes that a land tax is a direct tax. But the great question is, how can the court stop at the land tax? There is no conceivable difference in the principle of taxation between a tax on land and a tax on personal property, in certain predicaments. For instance, there is no difference in a tax on a house and the furniture in it. Suppose both are subject to the same rate of taxation, payable at the same time, assessed in the same manner, collected by the same person, and paid by the same person, and for the same government. Is it possible to conceive of any generic or specific differences between these taxes? The fact that one is levied on realty and the other on personalty, does not, in any degree, affect the character of the taxes. To put the matter in a clearer light, suppose that the law of a State abolishes all distinctions between visible tangible personal property and land, and subjects land to every legal incident of such personal property: what conceivable difference could there be between a tax on a house and the furniture in it?

(*e.*) That, accurately speaking, all taxes on expenses or consumption are indirect taxes, and a tax on carriages is of this kind.

We admit freely, that, according to our idea, taxes on consumption, justly understood, are indirect taxes; but we question very much whether a tax on carriages is of this description. A tax on a carriage is in no just sense a tax on consumption. It is simply a tax on a certain piece of personal property called a carriage. It is in no sense different from a tax on a wagon or a cart, except that its ownership implies greater wealth. We see in it no characteristic of an indirect tax. It is like the tax on the furniture in a house. Fine furniture, if taxed *ad volorem*, would be more productive than common furniture. So a tax on carriages, if there was a general *ad valorem* tax on carts, wagons, and carriages, would pay more in proportion, because of more value. But, in principle, it would be the same kind of tax. A tax on a carriage might be con-

sidered as in a certain sense a tax on a luxury. But a tax on a luxury may as well be a direct tax, as a tax on an article of mere utility. For example, the tax on a palatial residence is, in one sense, a tax on a luxury, but is as much a direct tax as a tax on an ordinary house. Because a carriage is a tax on a supposed luxury, is no reason for considering it a direct tax. To call it, as the court does, a tax on expense, is a meaningless designation in this connection. A tax on a fine house may as well be called a tax on expense. But this does not make it an indirect tax.

(*f.*) That no tax could be a direct tax in the sense of the Constitution which was not capable of apportionment.

This principle may be admitted to be true, but its application to the carriage tax is not perceived. The carriage tax can be apportioned in the same manner that the land tax is. The apportionment of the land tax, owing to the unequal value of lands in the various States, produces inequality. The same effect would follow in regard to the carriage tax; but, if so, it does not prevent the tax on land from being a direct tax; so it should not prevent the tax on carriages from being a direct tax. That is to say, this inequality, which is the natural consequence of the rule of apportionment, is no argument against the application of the rule in a proper case.

From this review of the decision and the dicta of the judges in Hylton's case, we think it is obvious that this great question, of what are direct taxes, was very crudely considered in that case.

4. Having thus disposed of Hylton's case, we propose now to submit our own views of the question.

Direct taxes are such taxes as are paid without expectation of reimbursement.

Indirect taxes are such taxes as the party paying expects in the course of business will be refunded to him. Mr. Bartlett defines it as follows: "A tax is indirect, when it is levied so that the person paying it can charge it over to some one else." For example, duties on imports are indirect taxes,

because the importer pays with the expectation that the tax will be returned to him in the enhanced price of the goods on which he has paid duties. It is expected the consumer will pay the duties. The consumer is the real tax payer, and it is this which makes the tax indirect. The tax falls on the consumer without his knowing it. So likewise a tax on internal manufactures is an indirect tax.

A very opposite illustration of these different kinds of tax is found in the legislation of Congress in the year 1815.

By the act of January 9, 1815, (3 Stats. at Large, p. 164,) a direct tax is laid on land and slaves. By the act of January, 18, 1815, an indirect tax is laid on numerous articles of internal manufacture, as iron, nails, candles, hats, umbrellas, canes, boots, shoes, ale, tobacco, &c. The direct tax on land and slaves is laid by the rule of apportionment; the indirect tax by the rule of uniformity.

The only characteristic difference between the taxes laid in these two acts is, that the tax in the first mentioned act was one which the tax payer could not in the usual course of business expect to have reimbursed. The taxes in the second act were such as he expected to have refunded to him by adding the tax to the cost of production.

This, we conceive, is the only definite rule which can be applied to the subject.

It may be difficult in every case to determine whether a tax is direct or indirect, even with the aid of whatsoever rule. But that is a difficulty intrinsic to the subject, which we cannot avoid by rules.

A good illustration of the difference between a direct and an indirect tax is furnished by a charge made on each visitor to Mt. Vernon.

The proprietor of the steamboat which runs between Washington and Mt. Vernon pays to the Mt. Vernon Association a fee of fifty cents for each visitor landed there. The proprietor of the boat pays this fee, but charges each passenger a sufficient amount to cover the fee. The visitor is ignorant of the charge. It is therefore an indirect tax on the visitor. If

the visitor goes to Mt. Vernon in his own conveyance, he is required to pay the fee. In such case it is a direct tax.

In the indirect tax one thing must occur: the party paying the tax must expect return. Another thing may occur, the party out of whose pocket the tax comes may be ignorant of it.

In the direct tax, the party paying cannot expect reimbursement, and cannot be ignorant of his paying the tax.

As an illustration of what we consider direct taxes, we would so designate all taxes on realized property, not engaged in business: as, for instance, a tax on all real and personal property held as an investment merely, or without reference to any active business; all taxes on choses in action, bonds, stocks, &c.; and on gold and silver coin not used in trade.

The income tax is in effect a direct tax.

The construction we have given to the terms "direct taxes," accomplishes several purposes:

(*a.*) It is the only construction which recognizes this clause of the Constitution as one of importance. The construction suggested in the case of Hylton, which restricts direct taxes to a capitation and land tax, belittles this great provision of the Constitution, and renders it a delusion.

(*b.*) It furnishes a principle by which direct taxes may be recognized. On the contrary, the decision in Hylton's case presents no intelligent general principle on the subject.

(*c.*) It is an honest construction.

5. To apply general observations: Is the act of July 13, 1866, taxing the circulation of the Veazie bank, a direct tax?

We submit that it is, because the bank could have no expectation of being reimbursed such a tax. The percentage of the tax is so large, that if paid by the bank, it must necessarily fall on the bank, without recourse. As it lacks the essential characteristics of an indirect tax, it must of necessity be a direct tax.

Being a direct tax, not being laid according to the rule of apportionment, it is null and void, for non-compliance with the Constitution.

III.

But if it should be held that the tax in question in this case is not a direct tax, then we submit that it is unconstitutional, because not laid in conformity with the rule of uniformity, as required in the Constitution.

The Constitution prescribes (art. 1, sec. 8) that "all duties, imposts, and excises shall be uniform throughout the United States.

Mr. Justice Chase, in the case of Hylton, says: "The term "duty" is the most comprehensive, next to the generical term "tax," and practically, in Great Britain, (whence we take our general ideas of taxes, &c.,) embraces taxes on stamps, tolls for passage, and is not confined to taxes on importation only."

We submit that the tax in this case is a "duty" in the sense of the Constitution; and, being a duty, it must be laid by the rule of uniformity.

The tax on the circulation of State banks, which is excepted to, is in the following words:

"That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them, after the first day of August, 1866."

By the act of June 3, 1864, (Statutes at Large, vol. xiii, p. 111,) it is provided that "In lieu of all existing taxes, every association, that is, every national banking association, shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each year, from and after the 1st day of January, 1864, upon the average amount of its notes in circulation."

We insist that, to comply with the rule of uniformity, this tax of ten per cent. imposed by the act of July 13, 1866, (sec. 9,) imposed on the circulation of State banks, should have

been extended to the circulation of national banks; and, this not having been done, this tax of ten per cent. on the circulation of State banks is unconstitutional.

The constitution of Wisconsin requires the rule of taxation to be uniform; and this means that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation equally with other taxable property, and coextensive with the territory to which it applies.

Gilman *vs.* The City of Sheboygan, 2 Black, 510.

The constitution of Wisconsin prescribes, (art. 8,) "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe." *Ib.*

All kinds of property must be taxed uniformly, or be absolutely exempt.

Knowlton *vs.* Supervisors of Rock county, 9 Wisconsin R., 410.

The Supreme Court of Ohio, in passing upon a provision in their State constitution, similar to that in Wisconsin, say: "A uniform rate per cent. must be levied upon all property subject to taxation."

City of Zanesville *vs.* Richards, 5 Ohio State Reports, 589.

See further to the same effect—

The Attorney General *vs.* The Winnebago Lake and Fox River Plank Road, 11 Wisconsin R., 42.

The Exchange Bank *vs.* Hines, 3 Ohio State R., 1.

IV.

We insist further, that the tax excepted to in this case is unconstitutional, on the following ground:

It is not a tax imposed for the sake of revenue. Its excessive character, which is made evident by reference to the tax

imposed on the circulation of the national banks already cited, proves that the true purpose of this tax is to destroy the State banks. Its immediate effect is to prohibit the circulation of the notes of the State banks. This, we submit, Congress could not do directly by a law expressly enacted to that end, forbidding under penalties the exercise of this franchise of circulating notes on the part of the State banks. The power of the States to charter banks has been unquestioned since the origin of the Government. If the States have this power, they cannot be deprived of it by Congress by any direct legislation. To destroy the franchise of circulating notes is to destroy the State banks. Congress cannot destroy the State banks by direct legislation; consequently it cannot by indirect legislation. What Congress is forbidden to do directly, it is forbidden to do indirectly. The onerous tax imposed in this case is an attempt by Congress so to do by indirection what it cannot do directly, and is therefore *ultra vires.*

It is true, as a general proposition, the judiciary will not look into the breasts of legislators, to understand the motives to legislation. But in this case it is unnecessary for the court to institute any such inquisition into legislative motives, because the motives are patent on the legislation of Congress. Considering the rate of taxation imposed on the circulation of the National banks, and comparing it with the rate imposed on the circulation of the State banks, the mind is compelled to recognize that the taxation on the circulation of the State banks is so excessive and prejudicially discriminating as to establish a purpose on the part of Congress to suppress the circulation of the State banks.

We conclude, therfore, that the tax complained of in this case is unconstitutional.

If Congress, by discriminating taxation, can destroy the State banks, they can equally, in the same manner, destroy the railroad system of the States. Suppose Congress, as a military measure, establishes a system of railroads; if the tax in this case is constitutional, they can impose such dis-

criminating taxes on the existing railroads as to necessitate their abandonment. Thus the General Government can not only establish a system of internal improvement of their own, but destroy the rival system of the States.

Suppose Congress should, under the war power, grant acts of incorporation to national associations for the purpose of manufacturing arms, and by discriminating taxes break down similar manufacturing associations in the States: would that be deemed constitutional?

If the prohibitory tax on State banks be held constitutional, it is difficult to place any limit to legislation of Congress in regard to the institutions of the States.

The question involved in this case is one, therefore, of transcendent importance. If it be determined in this case, as it must necessarily be, if the tax in this case is sustained, that the taxing power of Congress is unlimited, and cannot in any instance be inquired into by this court, then Congress is supreme to legislate without any limitations, provided it is done in the form of levying a tax.

But is the taxing power of Congress unlimited? We think not.

Article 1 of the Amendments to the Constitution provides that "Congress shall make no law respecting an establishment of religion." Suppose that Congress should levy a special tax for the purpose, avowed in the tax act, of supporting an "established religion," would not this court have jurisdiction to pronounce upon the constitutionality of such a tax? It would seem so; otherwise this prohibition in the Constitution would be of no avail.

Again, the Constitution provides that "no title of nobility shall be granted by the United States." Suppose Congress should grant a title of nobility to a person, and levy a tax for the support of that title, would this court hold such a tax constitutional? It is difficult to see how they could so hold.

We must conclude, then, that there is some limitation to the taxing power of Congress.

V.

The taxing power of Congress is conferred "to pay the debts and provide for the common defence and general welfare." But this specification of the purposes for which taxes are to be levied is to be taken as in harmony with the powers delegated to the United States, and also those prohibited to them, and reserved to the States or the people. In pursuance of this canon of construction, powers admitted to be in the States are not to be abrogated by a perverse exercise of the taxing power of the United States. To illustrate: The States have the conceded power to charter banks. The banks so chartered are subject to federal taxation. But there is a limit to that power of taxation. It is this, that it shall be exercised *as a taxing power*, for the purpose of *raising revenue*, but not as an administrative or municipal regulation for the purpose of destroying the State banks. It is the intention with which the taxing power is exercised in the case which makes it unconstitutional.

This principle of the intention with which an act is done being the test of its illegality, is a familiar principle in common law. As illustration, take the case of a vessel fitted out in supposed violation of our neutrality laws. The liability to condemnation of the vessel depends, under certain circumstances, exclusively and entirely on the question of intent.

Why may not this same principle of decision be applied in this case?

We admit that it is an inquiry of great delicacy on the part of the court, and one in which the proof should be very plain, and the character of the evidence unexceptionable. But all these requisites are found in this case. It is only necessary to examine the statute law, to peruse the acts of Congress cited in this Brief, to lead the mind with absolute certainty to the conclusion that the tax in this case was laid not for revenue purposes, but to destroy the State banks. This conclusion being

thus attained, how can the constitutionality of this tax be sustained, unless the court is prepared to hold that a law of Congress abolishing the State banks, pure and simple, is constitutional? It is a maxim of the law, that a party cannot do that indirectly which he cannot do directly. A familiar illustration of this is furnished by the decisions on the usury laws. (See 2 Saunders on Pleading and Evidence, title Usury, p. 895; 3 Tomlin's Law Dictionary, title Usury, p. 711.)

Why should a different principle prevail in determining the constitutionality of a law, when its validity may depend on the question of intention?

Upon this question of the intent with which a law is passed, Judge Parke, in the case of the Society for Savings *vs.* G. W. Coste, says:

"Suppose a person should invest the sum of $1,000 in United States securities, and the Legislature of the State should say to him, in the form of a law, 'inasmuch as we cannot tax you for the money loaned to the General Government, you, as an individual, shall pay a sum equal to the tax on $1,000 vested in taxable securities.' Would such a law be in harmony with the Constitution of the United States and the laws of Congress?

"It might be said that the law does not tax the sum loaned; indeed, it expressly declares that it does not, but imposes the tax upon the individual. But it would be said the *intent* is too obvious. It is in form a tax upon the individual, but in substance a tax upon the sum loaned.

"It is the duty of the court to look through the shadow to the reality."

That the court will look beyond the act, and test its constitutionality by the journals of the body that passed it, is held by the following cases:

The State *vs.* McBride, 4 Missouri R., 303.
People *vs.* Campbell, 3 Gilman (Illinois) R., 466.
People *vs.* Purdy, 2 Hill's (New York) R., 31.

VI.

There is another limitation on the taxing power of Congress. It is the clause of the Constitution which declares

that "private property shall not be taken for public use except on just compensation."

While, therefore, Congress has the power to take a part of any citizen's property in the shape of taxes for the public use, yet it cannot take the whole except on just compensation. And "the better opinion is, that the compensation or offer of it must precede or be concurrent with the seizure and entry upon private property under the authority of the State."

2 Kent's Comm., p. 339, note.

This great property right in the Constitution prevents Congress from destroying property by legislation, whether that legislation be in the form of a tax or in a more declared form.

Kent says, if the Legislature should "vacate a grant of property, or of a franchise," under pretext of some public use, it would be a gross abuse of their discretion, * * and the law would clearly be unconstitutional."

2 Kent's Comm., p. 339.

The tax in this case is for the purpose of destroying a franchise. This is confiscating private property for public use without compensation. In this point of view, the tax in this case is unconstitutional.

It is fortunate this provision of the Constitution may be invoked for this purpose, for it may prove to be the only bulwark against congressional usurpation which the State corporations may find efficacious to rely upon. And if the tax excepted to in this case is sustained as constitutional, charters from the States will be of the most precarious value, as they will depend entirely on congressional discretion, and no one can foresee what form or temper that discretion may take.

VII. Supplemental Suggestions.

"Direct taxes, which are properly capitation taxes, and taxes upon land; although a direct tax might be laid on other subjects, such as generally pervades all parts of the Union.

"A direct tax operates independently of consumption or

expenditure; while indirect taxes affect expense or consumption."

Duer's Constitutional Jurisprudence, p. 213.

"If indirect taxation be resorted to, the same duty must be imposed on the article liable to it." (*Ib.* 45.)

The power of taxation is a great governmental attribute, with which the courts have evenly shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.

Sedgwick on Constitutional and Stat. Law, p. 414.

If the States cannot tax the means by which the National Government performs its functions, neither on the other hand, and for the same reasons, can the latter tax the agencies of the State governments.

Cooley's Constitutional Limitations, p. 483

The same supreme power which establishmed the departments of the General Government determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the Constitution (of the United States) which admits of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is as much beyond the power of the national legislature as if the interference were direct and extreme."

Fifield *vs.* Close, 15 Michigan R., 509

"Taxation, not levied according to the principles upon which the right to tax is based, is an unlawful appropriation of private property to public uses."

City of Covington *vs.* Southgate, 15 B. Mon., 498.

Morford *vs.* Unger, 8 Iowa, 92.

The taxing power can only be exercised for the accomplishment of some object of public or common interest,

Soens *vs.* City of Racine, 10 Wisconsin R., 271.

A municipal corporation, if unrestricted by its charter, could, nevertheless, impose taxes and raise money only for legitimate municipal purposes, its power being limited by the object of its creation.

Foster *vs.* City of Kenosha, 12 Wiscon. R., 616.

The constitution of Wisconsin provides:

"SEC. 1. The rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe." (Const., art. 8.)

Under this article of the constitution, it was held that an act of the legislature taxing railroads one per cent. of their gross earnings was unconstitutional.

"The constitution, requiring taxation to be uniform, requires also equality as to all the property taxed. * * * The rule of taxation must be general, and applicable to all taxable property alike.

"The constitution designed to prevent discrimination in favor of one kind of property and against others.

"Uniform means unvariable, resembling itself at all times, conforming to one rule or mode. It is very clear, therefore, that a rule taxing horses at one rate, cattle at another, and land at a third, would not be a uniforn rule."

Attorney General *vs.* Winnebago, L. & F. R. Plk. Co., 11 Wisconsin R., 35.

By the constitution of Ohio taxation is required to be by "a uniform rule."

The court say: "The rule of uniformity in taxation, required by our State constitution, has a direct reference to the things taxed—to all taxable property—and forbids discrimination in the burden upon the different subjects of taxation."

Exchange Bank of Columbus *vs.* Hines, 3 Ohio State R., p. 16.

It has been held that the law of Congress, requiring judicial process to be stamped, could not constitutionally be applied to the process of the State courts; since, otherwise, Congress might impose such restrictions upon the State courts as would put an end to their effective action, and be equivalent practically to abolishing them altogether.

Warren *vs.* Paul, 22 Indiana R., 270.
Jones *vs.* Estate of Keep, 19 Wisconsin R., 369.
Union Bank *vs.* Hill, 3 Cold. (Tenn.) R., 325.

An unlimited power to make any and every thing lawful which the legislature might call taxation, would be, when plainly stated, an unlimited power to plunder the citizen.

Tyson *vs.* School Directors, 51 Penn. R., 9.

"It is the clear right of every citizen to insist that no unlawful exaction should be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can invoke the aid of the judicial tribunals for his protection."

Freeland *vs.* Hastings, per. Bigelow, Ch. J., 10 Allen, 575.

A State, which had not taxed the shares in State banks, could not tax shares in National banks.

Van Allen *vs.* The Assessors, 3 Wallace, p. 573.
Bradley *vs.* The People, 4 Wallace, 459.

Stock of the United States is not taxable by State laws.

Bank of Commerce *vs.* New York City, 4 Wallace, p. 620.

The capital of a bank invested in United States stocks is not liable to taxation. (*Ib.*)

The taxing power, so far as it is reserved to the States, and used within constitutional limits, cannot be controlled or restrained by this court: the prudence of its exercise not being a judicial question. (*Ib.*)

When part of a tax is illegal, all the proceedings to collect

it must be void, if it is impossible to separate that part which is legal from that which is illegal.

Stetson *vs.* Kempton, 13 Mass. R., 272.

The constitution of Massachusetts gives the Legislature power, "To impose and levy proportionate and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth."

Under this clause of the constitution, it was held that a special tax on banks could not be sustained. The court say, "Those taxes must be proportional upon all the inhabitants of, persons resident in, and estates lying within the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth, and then an assessment upon each individual, according to his proportion of that property. To select any specific article of property and assess it, would be a violation of this principle."

Portland Bank *vs.* Apthorp, 12 Mass. R., 262.

A tax on savings banks on account of their depositors could not be sustained under the provision of the constitution of Massachusetts giving power, "To impose and levy proportional and reasonable assessments." The court say, "Viewed as a tax assessed under this clause, it would be contrary to its provisions, because it is not proportional on all persons and estates in the Commonwealth, but is assessed on a certain class selected by the Legislature for the purpose of imposing a tax."

Commonwealth *vs.* The People's Five Cent Savings Bank, 5. Allen Mass. R., p. 431.

In this case the court say: "If they (the Legislature) have exceeded it, (the constitutional power,) * * there can be no doubt of the right of the citizens to resist such unauthorized exercise of power, and of the duty of this court to declare such legislative action void."

Ib. p. 431.

Under the provision that taxation shall be equal and uniform in the constitution of California, the Supreme court of

California say: "If the Legislature should pass a revenue law designedly operating unequally, or if a want of uniformity in its operation was apparent on its face, it would be the duty of the supreme court to interpose and prevent the commission of so grave an injustice.

People *vs.* Coleman, 4. Cal. R., 49.

VIII. Conclusion.

We conclude, therefore, that the tax in question is unconstitutional, on the following grounds, namely:

1. Because it is a direct tax, without apportionment among the States.

2. Because, if not a direct tax, then it violates the rule of uniformity required by the Constitution.

3. Because it is not a tax imposed for revenue, but, as justly described by Cooley, it is imposed in order to tax out of existence the banks of the States.

4. While not imposed for revenue, it is in effect encroachment upon, and usurpation of, the municipal power of the separate States.

5. Because the effect of the tax is to take, without compensation, private property, namely, the franchises of the banks of the States.

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Dorothy Johnson

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE PRESIDENT, DIRECTORS, AND Company of the Veazie Bank, vs. JEREMIAH FENNO, COLLECTOR OF internal revenue. } No. 153.

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